

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL COOK,

NO. C 04-05121 JW PR

Petitioner(s),

**ORDER GRANTING MOTIONS TO
PROCEED IN FORMA PAUPERIS;
ORDER TO SHOW CAUSE**

v.

A. K. SCRIBNER, Warden,

DOCKET NOS. 2, 4

Respondent(s).

INTRODUCTION

Petitioner, a prisoner of the State of California, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and applications to proceed in forma pauperis. Venue is proper in this judicial district because Petitioner was convicted and sentenced in San Mateo County Superior Court. See 28 U.S.C. § 2241(D).

BACKGROUND

According to the allegations in the petition a jury found Petitioner guilty of assault with a deadly weapon. On January 2, 2003, he was sentenced to fifteen years and eight months in prison. Petitioner alleges that he appealed his conviction to the California Court of Appeal and the California Supreme Court before filing the instant federal habeas corpus petition on December 3, 2004.

STANDARD OF REVIEW

This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243. Federal courts have a duty to construe pro se petitions for a writ of habeas corpus liberally. Zichko v. Idaho, 247 F.3d 1015, 1020 (9th Cir. 2001).

As grounds for federal habeas relief, Petitioner asserts (1) there was insufficient evidence to uphold Petitioner's conviction; and (2) the trial court failed to bifurcate trial on the prior offense allegations. Liberally construed, Petitioner's allegations are sufficient to require a response.

CONCLUSION

1. Petitioner's motions to proceed in forma pauperis (docket numbers 2 and 4) are GRANTED.

2. The Clerk of the Court shall serve by certified mail a copy of this Order and the petition and all attachments thereto upon Respondent¹ and Respondent's attorney, the Attorney General of the State of California. The Clerk shall also serve a copy of this Order on the Petitioner at his most current address.

3. Respondent shall file with this Court and serve upon Petitioner, no later than **sixty (60) days** of the issuance of this Order, an Answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent shall file with the Answer a copy of all portions of the State trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

¹ Petitioner erroneously named San Mateo County Superior Court as Respondent. The Court hereby sua sponte substitutes in the proper Respondent, A.K. Scribner, Warden of California State Prison Corcoran, where Petitioner is currently incarcerated.

If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with the Court and serving it on Respondent no later than **forty-five (45) days** of his receipt of the Answer. Should Petitioner fail to do so, the petition will be deemed submitted and ready for decision **forty-five (45) days** after the date Petitioner is served with Respondent's Answer.

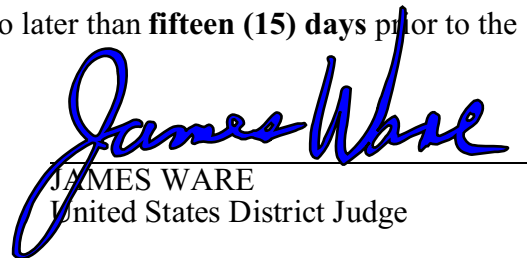
4. Respondent may file a motion to dismiss on procedural grounds in lieu of an Answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall file with the Court and serve on Respondent an opposition or statement of non-opposition to the motion no later than **forty-five (45) days** of receipt of the motion, and Respondent shall file with the court and serve on Petitioner a reply no later than **fifteen (15) days** of receipt of any opposition.

5. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the court informed of any change of address by filing a separate paper with the Clerk of the Court headed "NOTICE OF CHANGE OF ADDRESS," and comply with any orders of the Court within the time allowed or ask for an extension of that time. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See Martinez v. Johnson, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

6. Petitioner is reminded that all communications with the Court, whether by way of formal legal motions or informal letters, must be served on Respondent by mailing a true copy of the document to Respondent's counsel.

7. Extensions of time are not favored, though reasonable extensions will be granted. Any motion for an extension of time must be filed no later than **fifteen (15) days** prior to the deadline sought to be extended.

Dated: August 11, 2006


JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

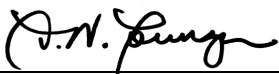
2 Michael C. Cook T-79529
3 California State Prison Corcoran
4 4001 King Avenue
5 Corcoran, CA 93212
6 P.O. Box 8800
7 Corcoran, CA 93212-8309

8 Michael C. Cook T-79529
9 Pelican Bay State Prison
10 P. O. Box 7500
11 Crescent City, Ca 95552-7500

12 Michael C. Cook T-79529
13 C.S.P. Sacramento New Folsom
14 Represa, California 95671

15 **Dated: August 14, 2006**

Richard W. Wieking, Clerk

By: 
Albert "J" Younger
Courtroom Deputy